91-391

Supreme Court, U.S.
FILED
JUL 23 1991
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANDREW E. KARIM,

Petitioner,

v.

NANCY ELLAN BOYER,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Counsel of Record

July 23, 1991

QUESTIONS PRESENTED

1. Can an order imposing monetary sanctions pursuant to Rule 9011 be treated as void because it was rendered under circumstances so offensive to the Due Process Clause of the Fifth Amendment that the sanctioning court lacked jurisdiction to act against the alleged offender?

2. Does a bankruptcy judge, who had earlier dismissed a bankruptcy case *sua sponte*, have the authority during the pendency of the dismissal's appeal to impose monetary sanctions in a post-dismissal proceeding whose sole purpose is to affect the merits of the bankruptcy case?

3. Is a monetary sanction appropriate against a lawyer who challenges the court's jurisdiction and attempts to advocate a tenable position contrary to a result which the court had forecasted?

4. Does the amount of the monetary sanction charged against this petitioner constitute an "excessive fine" or "cruel and unusual punishment" under the Eight Amendment?

5. Does a bankruptcy judge have jurisdiction to solicit and later to entertain a creditor's motion to revoke a debtor's discharge after the bankruptcy case had been involuntarily dismissed *sua sponte* and while an appeal from the case's dismissal was pending?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

ANDREW E. KARIM,

Petitioner,

v.

NANCY ELLAN BOYER,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Andrew E. Karim petitions for a writ of certiorari to review the judgment in this case of the U.S. Court of Appeals for the Tenth Circuit.

DECISIONS BELOW

The order and judgment of the court of appeals is found in App. A. The district court's order is at App. B, and the bankruptcy court's order is found at App. C.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1991. App. A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This controversy involves the Fifth and Eighth Amendments to the United States Constitution, 11 U.S.C. § 727(d), Federal Rules of Civil Procedure 60(a) and (b), and Bankruptcy Rules 9011, 9024, 4004(c), 8005 and 9006(b). The pertinent portions of the foregoing provisions are set forth in App. K.

STATEMENT OF THE CASE

Factual Background.

In a bankruptcy case filed under Chapter 7 of the Bankruptcy Code the debtor, David Lee Wear, was represented by the petitioner, Andrew E. Karim. The respondent, Nancy Ellan Boyer, was a creditor who had objected to the debtor's discharge under 11 U.S.C. § 727(a)(4)(A). Following a trial which was held on August 17, 1988, the bankruptcy court entered judgment that day denying the objection but excepted one debt from discharge. All other debts were declared discharged. App. J.

On September 20, 1988, during a hearing in an adversary proceeding related to the bankruptcy case, the judge *sua sponte* and without prior notice dismissed the case. App. I. The debtor timely appealed. App. H. Later, he asked the bankruptcy court to stay the dismissal order's effectiveness, which it did at a December 1, 1988 hearing. During the same hearing the judge announced the existence of a clerical omission in the record. He described the mistake as the clerk's failure to "issue" (or enter) the debtor's discharge which had been granted August 17, 1988. App. J; Trans. of 12/01/88 Stay Hearing at 22-23. The judge then ordered the clerk to make the entry. Though of little importance at the time, the judge's December 1 recognition of this clerical error will prove to be critical to the issues tendered by this petition. On December 2, 1988 the clerk entered the debtor's discharge. App. G.

In February of 1989, for reasons unknown to the petitioner, the bankruptcy judge *sua sponte* set the wheels in motion for yet another proceeding in the same dismissed bankruptcy case. He invited (or directed) the respondent to file a motion "seeking to have the discharge vacated or revoked as having been improvidently granted." App. F. At a hearing held on May 5, 1989 the judge announced that the clerk's December 2 *entry* of debtor's discharge is a clerical error. Upon this virtually *ex parte*

determination the court revoked the discharge. App. C. Petitioner's challenge to the court's jurisdiction and attempts to apprise the judge of applicable law precipitated a sudden attack from the bench. The result: two $1,000.00 sanctions against both the petitioner and debtor, jointly and severally. App. C; Trans. of 5/5/89, Revocation Hearing at 8-11.

Petitioner timely appealed to the district court, which "dismissed" the appeal. App. B. Petitioner then sought corrective relief in the United States Court of Appeals for the Tenth Circuit, which affirmed the district and bankruptcy courts' decisions. App. A.

Federal Jurisdiction and the Appeals Process.

The basis for federal jurisdiction in bankruptcy court (the court of first instance) is 28 U.S.C. § 157. The appeal to the district court was made pursuant to 28 U.S.C. § 158(a). The Court of Appeals' jurisdiction to review all decisions by the district and bankruptcy courts rested upon 28 U.S.C. § 158(d).

REASONS FOR GRANTING THE WRIT

The Petitioner brings this matter before the Court because the highest ideals of the Bar as well as an individual's fundamental rights in the courtroom are implicated by the decisions rendered below. Resolution of the issues tendered herein is critical both to the power of courts to levy monetary sanctions and to the latters' orderly imposition under Bankruptcy Rule 9011 and Rule 11 of the Federal Rules of Civil Procedure.

I. CAN AN ORDER IMPOSING MONETARY SANCTIONS PURSUANT TO RULE 9011 BE TREATED AS VOID BECAUSE IT WAS RENDERED UNDER CIRCUMSTANCES SO OFFENSIVE TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT THAT THE SANCTIONING COURT LACKED JURISDICTION TO ACT AGAINST THE ALLEGED OFFENDER?

The circuits are split on what kind of due process must be afforded before sanctions may be properly imposed. Treatment of the notice element alone lacks uniformity. The Tenth Circuit has addressed the notice issue by requiring that the offender first be apprised that sanctions are being considered. See *White v. General Motors Corp., Inc.*, 908 F.2d 675, 686 (10th Cir. 1990); *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987). While the Federal Circuit speaks in non-specific terms of "fair notice," *Beatrice Foods Co. v. New England Printing*, 899 F.2d 1171, 1177 (Fed. Cir. 1990), the quoted term is vague and subject to varying interpretations.

The Eleventh Circuit, on the other hand, has adopted a radical approach. There, the mere existence of Rule 11 can operate to provide sufficient notice. See *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987). This view is shared by the Fifth Circuit. See *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 346 (5th Cir. 1990).

The Eight Circuit's view appears to parallel that of the Tenth Circuit, requiring advance notice that sanctions might be imposed. *Jensen v. Federal Land Bank of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989). The Ninth Circuit also requires prior notice. *Tom Growney Equip., Inc. v. Shelley Irr. Development*, 834 F.2d 833, 836 (9th Cir. 1987).

On the question of jurisdiction (in the due process sense) to enforce either Bankruptcy Rule 9011 or Rule 11 of the Federal Rules of Civil Procedure, the Ninth Circuit, in *Tom Growney Equipment, supra* at 837, held that the district court had *no jurisdiction* to impose monetary sanctions pursuant to Rule 11 when procedural due process has not been afforded. The Tenth Circuit appears to have held to the contrary when it concluded that the petitioner's due process arguments are without merit.

The decision by the Court of Appeals below also directly conflicts with the pronouncement by this Court that sanctions "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1990). The impact of a due process violation upon the sanctioning court's jurisdiction thus remains uncertain.

II. DOES A BANKRUPTCY JUDGE, WHO HAD EARLIER DISMISSED A BANKRUPTCY CASE *SUA SPONTE*, HAVE THE AUTHORITY DURING THE PENDENCY OF THE DISMISSAL'S APPEAL TO IMPOSE MONETARY SANCTIONS IN A POST-DISMISSAL PROCEEDING WHOSE SOLE PURPOSE IS TO AFFECT THE MERITS OF THE BANKRUPTCY CASE?

This question centers on judicial authority to impose sanctions under Bankruptcy Rule 9011. This Court is called upon not merely to correct a fundamental error committed by a bankruptcy judge, but to address a problem unresolved by this Court in *Cooter & Gell v. Hartmarx Corp.*, __ U.S. __, 110 S.Ct. 2447 (1990). There, the district court judge imposed sanctions against plaintiff's counsel for violation of Rule 11, F.R.Civ.P., after the complaint had been voluntarily dismissed. The first question was whether the dismissal terminated the district court's

jurisdiction to impose sanctions. The Court gave a negative answer, holding that a judge may determine issues which are *collateral* to a terminated action. Here, the question sought to be answered is whether a bankruptcy judge has the power to impose sanctions in a post-dismissal proceeding whose sole purpose is to affect the *merits* of the dismissed case.

By May 5, 1989, when the sanctions in question were levied against the petitioner, the following events had already occurred:

(1) the August 17, 1988 judgment denying the sole objection to debtor's discharge;

(2) the discharge order's entry (on December 2, 1988);

(3) the bankruptcy case's dismissal *sua sponte* and without either notice or an opportunity for hearing;

(4) the filing of debtor's notice of appeal from the bankruptcy case's dismissal.

Indeed, sanctions were imposed against the petitioner at a stage of litigation *unlike* an independent, supplemental motion for costs or attorney's fees. While the respondent had brought the motion to revoke the discharge under the bankruptcy court's direction, the judge, in effect, *reopened* the case in order to change the result of a final adjudication on the merits. The apparent flaw in entertaining a motion rather than a complaint to accomplish the revocation goes beyond procedural error. The only permissible means to revoke a discharge in bankruptcy is by invoking the provisions of 11 U.S.C. § 727(d). The bankruptcy judge's own unilateral orchestration of the revocation *via* an illusory clerical error was tantamount to a usurpation of adjudicatory authority. The appellate courts refused to address this vital issue.

Assuming the "clerical error" is illusory and, in reality, was nothing more than a pretext to do what the law does not allow a bankruptcy judge to do, would the order imposing sanctions against debtor's counsel be void for want of jurisdiction?

III. IS A MONETARY SANCTION APPROPRIATE AGAINST A LAWYER WHO CHALLENGES THE COURT'S JURISDICTION AND ATTEMPTS TO ADVOCATE A TENABLE POSITION CONTRARY TO A RESULT WHICH THE COURT HAD FORECASTED?

The following colloquy took place at the May 5 hearing immediately after the petitioner challenged the use of a *motion* to revoke a discharge in bankruptcy:

> THE COURT: [Y]ou're just wasting my time and his time. You're going to pay for it. You're going to be paying their attorneys fees, so keep -- I'm going to impose sanctions under Rule 9011.
>
> MR. KARIM: Your Honor --
>
> THE COURT: I've already told you, back -- I've got this transcript here. I told you back before, it's a thousand dollars, the next time it's going to be two. So it's going to be two today, and I'll tell you why.
>
> MR. KARIM: Your Honor, I really --
>
> THE COURT: You're just wasting my time, the other side's time. All you're doing is carrying out a frivolous divorce case in the Bankruptcy Court.
>
> MR. KARIM: Respectfully, Your Honor, I disagree.

> THE COURT: Like this here. Well, you may disagree then. You've got a right to appeal, and have at it.

Trans. of 5/5/89 Revocation Hearing at 8.

The bankruptcy judge not only precluded any meaningful opportunity to be heard on the two matters which were then pending, but also frustrated petitioner's attempts to defend the sudden imposition of sanctions. When petitioner stated to the judge that he was being stifled (Trans. of 5/5/89 Revocation Hearing at 9), the judge announced:

> THE COURT: Well, all right. If you want to waste more time, I'll impose more in the way of sanctions.
>
> MR. KARIM: Your Honor, I just want to say that the Court --
> THE COURT: It's $2,000 now.

Trans. of 5/5/89 Revocation Hearing at 9.

Glaring from the record is a gross abuse of discretion. The sanction order against the petitioner is so totally devoid of evidentiary support that it must not be left undisturbed.

IV. DOES THE AMOUNT OF THE MONETARY SANCTION CHARGED AGAINST THIS PETITIONER CONSTITUTE AN "EXCESSIVE FINE" OR "CRUEL AND UNUSUAL PUNISHMENT" UNDER THE EIGHT AMENDMENT?

The Eighth Amendment of the Constitution of the United States provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." If viewed as a fine, additional procedural protections

are affordable under Rule 42(b), Federal Rules of Criminal Procedure. See *Cotner v. Hopkins*, 795 F.2d 900, 902 [10th Cir. 1986] (prior to imposing Rule 11 sanction as a fine precipitated by failure to comply with court order, person was entitled to procedural protections under Rule 42(b), F.R.Crim.P.).

Inasmuch as the amount of sanctions in contest total $2,000.00, the petitioner urges this court to consider the question whether a monetary sanction can constitute either an excessive fine or a form of cruel and unusual punishment forbidden by the Constitution.

V. DOES A BANKRUPTCY JUDGE HAVE JURISDICTION TO SOLICIT AND LATER TO ENTERTAIN A CREDITOR'S MOTION TO REVOKE A DEBTOR'S DISCHARGE AFTER THE BANKRUPTCY CASE HAD BEEN INVOLUNTARILY DISMISSED *SUA SPONTE* AND WHILE AN APPEAL FROM THE CASE'S DISMISSAL WAS PENDING?

The bankruptcy judge solicited the respondent to move for revocation of the debtor's discharge. The reason given initially for causing the motion to be brought was that the discharge had been "improvidently granted." During the May 5, 1989 hearing and without notice to either the debtor or the petitioner, the same judge nonetheless changed the proceeding's express purpose to one for correcting a "clerical error," while adhering to the motion's original goal. In either instance the judge acted without authority. And even if this were not so, the proceeding is fraught with error.

A discharge in bankruptcy alleged to have been granted improvidently may be revoked *only by a complaint* brought pursuant to 11 U.S.C. § 727 and Bankruptcy Rule 9024. This makes a *motion* to revoke discharge impermissible. See Bankruptcy Rule 9024; *In re Couch*, 43 B.R. 57, 59

(Bkrtcy.E.D.Ark. 1984). Clerical errors, on the other hand, may be corrected by motion. But if an appeal be pending at the time the correction is sought, leave of the appellate court must first be obtained. Bankruptcy Rule 9024 and Rule 60(a), F.R.Civ.P. Here, the debtor's appeal from his bankruptcy case's dismissal was still pending at the time of the May 5 hearing. The judge neither sought nor obtained leave from any appellate court to tamper with any part of the bankruptcy case's record.

The Court of Appeals, the district court and the bankruptcy judge all agree that the discharge order's *entry* on December 2, 1988 was a clerical error. This is without any doubt contrary to what the record reveals. On August 17, 1988 the respondent's objection to the debtor's discharge was denied and, with the exception of one debt, all other debts were declared discharged. Although the judge had directed that judgment be so entered, entry of the discharge order did not immediately follow. It should have according to Bankruptcy Rule 4004(c). See *In re Burkhart*, 91 B.R. 587, 588 (Bkrtcy.W.D.Okl. 1988).

In any event, once the entry was made on December 2, 1988, there was no clerical error to correct. As stated earlier in this petition, the clerk's corrective act on December 2 was performed at the direction of the bankruptcy judge himself, who had the day before recognized the entry's *omission*, and not the entry, as the clerical error.

Without a true clerical error, with no leave from an appellate court, and no complaint brought under 11 U.S.C. § 727(d), the bankruptcy judge succeeded in revoking the debtor's discharge by characterizing the latter's December 2 entry as a "clerical error." Is the bankruptcy court vested with such power? Only this Court can provide the answer.

CONCLUSION

The sanction order manifests an extreme departure from the usual course of judicial proceedings. It is an aberration that the appellate courts have sanctioned *sub silentio*. For these and all the other foregoing reasons the petitioner urges this Court to grant a writ of certiorari.

Respectfully submitted,

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(405) 843-3900

July 23, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re: DAVID LEE WEAR	)	
	)	
Debtor.	)	
	)	
ANDREW E. KARIM,	)	Filed Apr 24, 1991
	)	
Appellant,	)	
	)	
v.	)	No. 90-6314
	)	(D.C.No.CIV-89-1117-W)
NANCY ELLEN BOYER,	)	(W.D. Okla.)
	)	
Creditor-Appellee.	)	

ORDER AND JUDGMENT*

Before ANDERSON, TACHA, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Andrew Karim appeals from an order of the district court upholding the bankruptcy court's imposition of sanctions pursuant to Bankruptcy Rule 9011. Appellant represented David Wear in his Chapter 7 bankruptcy case. Debtor filed his voluntary petition under Chapter 7 on August 11, 1987. Appellee Nancy Ellan Boyer, a creditor and former wife of debtor, commenced an adversary proceeding objecting to debtor's discharge under 11 U.S.C. Section 727. She also sought to have debtor's property division alimony debt excepted from discharge under 11 U.S.C. Section 532(a)(2)(A). Following a hearing held on August 17, 1988, the bankruptcy court entered judgment in favor of Boyer excepting the property division alimony judgment from discharge. At the same hearing the court denied Boyer's objections to discharge, but a discharge order was never entered.

At a hearing held on September 20, 1988, the court announced it was dismissing debtor's bankruptcy case pursuant to 11 U.S.C. Sections 707(b) and 305(a), noting that debtor was improperly using the bankruptcy court as a forum to continue to litigate his divorce case. The court also expressed its intent to impose sanctions against debtor and his counsel.

Debtor appealed this dismissal to the district court on September 30, 1988. On December 1, 1988, the bankruptcy court stayed its September 20 order dismissing the case pursuant to Bankruptcy Rule 8005. It ordered the case suspended until the district court ruled on debtor's appeal. The district court subsequently affirmed the order dismissing debtor's case.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Following the entry of the stay order but before the district court's decision on debtor's appeal, the clerk of the court inadvertently entered an order discharging debtor's obligations. The court suggested Boyer file a motion pursuant to Federal Rule of Civil Procedure 60 and 11 U.S.C. Section 105 seeking revocation of debtors discharge as having been improvidently granted. The court believed such a motion was necessary to correct this clerical error. Boyer filed the motion on March 29, 1989.

At a hearing on May 5, 1989, debtor argued the court lacked jurisdiction to enter an order vacating the discharge order. He asserted his debts had been discharged by the court's order on August 17, 1988. The court rejected this argument and granted Boyer's motion. It also imposed sanctions in the sum of $2,000 against debtor and appellant jointly and severally. Appellant appealed the imposition of sanctions to the district court, which affirmed the order of the bankruptcy court.

On appeal to this court, appellant argues the bankruptcy court was without jurisdiction to vacate the discharge and therefore lacked jurisdiction to impose sanctions. This argument is without merit. We agree with the bankruptcy court's characterization of the entry of the dismissal order as a clerical order. The bankruptcy court had the power to vacate a discharge entered as a result of a clerical error. See Matter of Pilar Cordova Antuna, 45 B.R. 271, 272-74 (Bkrtcy. W.D. Mo. 1985). The court therefore had jurisdiction to impose sanctions.

We agree with the district court that appellant's other arguments are without merit. We AFFIRM for substantially the same reasons given by the district court. The mandate shall issue forthwith.

ENTERED FOR THE
COURT
Deanell Reece Tacha
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	
	)	
DAVID LEE WEAR,	)	
	)	
Debtor,	)	
	)	
DAVID LEE WEAR and ANDREW E. KARIM,	)	Filed Sep 5, 1990
	)	
Appellants,	)	
	)	
vs.	)	No. CIV-89-1117-W
	)	(BK-87-05872-A)
THE HONORABLE RICHARD L. BOHANON, Chief Judge, United States Bankruptcy Court for the Western District of Oklahoma	)	
	)	
Appellee.	)	

ORDER

On June 5, 1989, appellants David Lee Wear, a debtor in bankruptcy, and Andrew E. Karim, Wear's attorney, filed their Notice of Appeal to the United States District Court for the Western District of Oklahoma from two adverse rulings announced by The Honorable Richard Bohanon, United States Bankruptcy Judge for the Western District of Oklahoma, on May 5, 1989, and memorialized in writing on May 19, 1989. The appeal was stayed at the appellants' request pending resolution by the United States Court of Appeals for the Tenth Circuit of the appellants' Petition

for Writ of Mandamus or Prohibition. The petition has been denied by the Tenth Circuit and the matter now comes before this Court.

The appeal is being pursued solely by appellant Karim and he is challenging only the second order entered by Judge Bohanon: imposition of sanctions in the amount of $2000.00, jointly and severally against Karim and Wear.

The sanctions were imposed because Karim, on Wear's behalf, opposed the efforts of creditor Nancy E. Boyer to have a discharge that was inadvertently entered by the Clerk of the Bankruptcy Court vacated. The Court is aware that numerous pleadings, appeals, writs and requests for stays have been filed by appellant Karim on Wear's behalf and that the majority of these papers merely rehash the state court divorce proceedings involving appellant Wear and his former spouse, Boyer.

In reviewing appellant Karim's arguments, which are set forth in three numbered "Statements of Issues" but then argued in four propositions of error, the Court finds that the requested relief is not warranted. The issue of sanctions is collateral to the underlying bankruptcy case and requires only a determination of whether appellant Karim abused the judicial process. Thus, Judge Bohanon had jurisdiction to act and his imposition of sanctions neither violated Karim's right to procedural due process under the fifth amendment to the United States Constitution not the prohibition against excessive fines and cruel and unusual punishment found in the eighth amendment to the United States Constitution.

Accordingly, the Court finds that the appeal filed by appellant Karim should be and is hereby DISMISSED.

ENTERED this 5th day of September, 1990.

s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 9-5-90

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	Filed May 19, 1989
	)	
DAVID LEE WEAR,	)	Case No. 87-05872-A
	)	Chapter 7
Debtor.	)	

ORDER

On the 20th day of September, 1988, this case was ordered dismissed under 11 U.S.C. Section 707 and 305; the debtor appealed that order. While the order was on appeal the clerk caused debtor's discharge to be granted. The order dismissing the case was subsequently affirmed by the District Court. At a hearing concerning collateral issues on February 15, 1989, the creditor was allowed to file a motion under Rule 60 and 11 U.S.C. Section 105 seeking to have the discharge revoked as having been improvidently granted.

At the hearing on this matter on the 5th day of May, 1989, the debtor appeared by and through his counsel, Andrew E. Karim, and the creditor appears by and through her counsel, Michael R. Hoover. The court proceeds to review the file and pleadings in this matter and to hear argument of counsel.

IT IS ORDERED AND ADJUDGED that pursuant to the findings of fact and conclusions of law as stated orally and recorded in open court, that the discharge entered in this matter on the 2nd day of December, 1988, should be and is hereby revoked.

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to findings of fact as stated orally and recorded in open court, sanctions be imposed in this matter in the sum of Two

Thousand Dollars ($2,000.00) against debtor and his counsel jointly and severally. Said sanctions to be paid to the creditor instanter.

May 18, 1989

s/ Richard L. Bohanon
JUDGE OF THE BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Respectfully submitted,

s/ Michael L. Hoover
MICHAEL R. HOOVER, OBA #4352
ROBINSON and HOOVER
Attorney for Creditor, Nancy Boyer
P.O. Box 61088
Oklahoma City, Oklahoma 73146
Telephone: 405/528-0100

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed this 18th day of May, 1989, with postage prepaid to: Mr. Andrew E. Karim, KARIM & KARIM, 2630 Northwest Expressway, Suite B, Oklahoma City, Oklahoma, 73112, Attorney for Debtor.

s/ Michael R. Hoover
MICHAEL R. HOOVER

APPENDIX D

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	Filed Mar 23, 1989
DAVID LEE WEAR,	)	BK-87-5872-A
Debtor.	)	

ORDER

NOW on this 22nd day of March, 1989, on the creditor's application for extension of time and for good cause shown and over the objection of counsel for the debtor, the creditor is given until the 29th day of March, 1989, to file a motion to vacate discharge in the above-styled and numbered cause, and respondent will be allowed 20 days for his response.

IT IS FURTHER ORDERED that the hearing set for the 24th day of March, 1989, at 9:30 a.m. in the above-styled and numbered cause and also in adversary proceeding #88-0348 is continued until the 5th day of May, 1989, at 9:30 a.m.

s/ Richard L. Bohanon
UNITED STATES BANKRUPTCY
JUDGE FOR THE WESTERN
DISTRICT OF OKLAHOMA

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed with postage prepaid this 22 day of March, 1989, to: Mr. Andrew E. Karim, KARIM & KARIM, Attorney for Debtor, 2630 Northwest Expressway, Suite B, Oklahoma City, Oklahoma, 73112.

s/ Michael R. Hoover
MICHAEL R. HOOVER

APPENDIX E

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

	)	Filed Mar 22, 1989
IN RE:	)	
	)	
DAVID LEE WEAR,	)	BK-87-5872-A
	)	Chapter 7
Debtor.	)	

APPLICATION FOR EXTENSION OF TIME

COMES NOW the creditor, Nancy Boyer, and moves this court for an extension of time in which to file a motion to vacate discharge in the above-styled and numbered cause and in support thereof respectfully shows the court as follows:

1) at a hearing concerning collateral issues on February 15, 1989, the creditor was allowed time to file a motion seeking to vacate the discharge in the above-styled and numbered cause and a hearing was set for the 24th day of March, 1989. That time in which to file a motion is now passed.

2) That there have been no previous applications for extension of time in this matter.

3) That counsel for the creditor has contacted counsel for the debtor and he objects to the granting of this motion.

4) That an extension of time will necessitate continuing the hearing set for March 24, 1989.

s/ Michael R. Hoover

MICHAEL R. HOOVER, OBA #4352
ROBINSON and HOOVER
Attorney for Creditor, Nancy Boyer
P.O. Box 61088
Oklahoma City, Oklahoma 73146
Telephone: 405 / 528 - 0100

APPENDIX F

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF OKLAHOMA

_____x		Filed Feb 16, 1989
	:	
IN RE:	:	
	:	
DAVID LEE WEAR,	:	BK-87-5872-A
	:	Chapter 7
Debtor.	:	
	:	
_____x		

ORDER AND NOTICE OF HEARING

This case was ordered dismissed under 11 U.S.C. Secs. 707 and 305 and debtor appealed that order. While the order was on appeal the Clerk caused debtor's discharge to be granted.

At a hearing concerning collateral issues on February 15, 1989 the creditor, Nancy E. Boyer, was allowed time to file a motion under Civil Rule 60 and 11 U.S.C. Sec. 105 seeking to have the discharge vacated or revoked as having been improvidently granted. The time for debtor's response was also established.

These issues will be heard on the 24th day of March, 1989 at 9:30 a.m.

Dated at Oklahoma City, Oklahoma this 16th day of February, 1989.

By the Court.

s/ Richard L. Bohanon
Richard L. Bohanon
Bankruptcy Judge

APPENDIX G

U.S. Bankruptcy Court for the
U.S. BANKRUPTCY COURT, Western District, Oklahoma
201 Dean A. McGee Ave. 7th Floor, Oklahoma City, Okla. 73102

In Re a Petition for Relief under chapter 7 of Title 11, U.S. Code, filed by or against the below-named Debtor(s) on August 11, 1987:

DEBTOR : DAVID LEE WEAR of 5936 N. SAPULPA, OKLAHOMA CITY, OK 73112, SSAN: 441-56-7017

[ ] CASE NO. 87-05872-A

Filed Dec 2, 1988

DISCHARGE OF DEBTOR

It appears that the person named above filed a petition commencing a case under title 11, United States Code on the above date, that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court (or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained).

IT IS ORDERED THAT:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under 11 U.S.C. Section 523;

(b) unless heretofore and hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from the discharge under clauses (2), (4) and (6) of 11 U.S.C. Section 523 (a);

(c) debts determined by this court to be discharged under 11 U.S.C. Section 523.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

s/ Richard L. Bohanon
Bankruptcy Judge

Dated: December 2, 1988

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	Filed Sep 30, 1988
	)	
DAVID LEE WEAR,	)	Case No. 87-05872-A
	)	Chapter 7
Debtor.	)	

NOTICE OF APPEAL

The debtor, David Lee Wear [Wear], hereby gives notice of his appeal to the United States District Court for the Western District of Oklahoma from the Bankruptcy Court's order of September 20, 1988 dismissing Wear's bankruptcy case pursuant to 11 U.S.C. Sections 305(a) and 707(b).

The parties to the order appealed from and the names addresses of their respective attorneys are as noted on Exh attached hereto and incorporated herein.

Dated this 30th day of September, 1988.

KARIM & KARIM

s/ Andrew E. Karim
ANDREW E. KARIM
2630 Northwest Expressway
Suite B
Oklahoma City, Oklahoma 73112
(405) 949-1700

ATTORNEY FOR DEBTOR

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeal was mailed, postage prepaid, to all parties listed on Exhibit "A" attached hereto, on the _____ day of September, 1988.

_____

ANDREW E. KARIM

EXHIBIT "A"

American Express Travel
Thomas D. Mirabile
5100 N. Brookline, Suite 850
Oklahoma City, OK 73112

Nancy Ellan Boyer
c/o Michael R. Hoover
P.O. Box 61088
Oklahoma City, OK 73146

Citibank Mastercard
c/o Payco
P.O. Box 470607
Tulsa, OK 74147

Columbia House
c/o Eastern Credit Corp.
P.O. Box 8100
Bohemia, N.Y. 11716

CONOCO
P.O. Box 2107
Ponca City, OK 74603

Dillard's
P.O. Box 8027
Little Rock, AR 72203-8027

First National Bank of
Wilmington
Mastercard
774 Christiana Rd.
Newark, DE 19713

Merle Gile,Esq.
Gile & Gile
2909 N.W. 31
Oklahoma City, OK 73112

Glen Justice
Mortgage Co., Inc
Dallas, TX 75221

Oklahoma City Clinic
701 N.E. 10th
Oklahoma City, OK 73104

Transamerica Financial
Services
P.O. Box 12906, Suite 310
Oklahoma City, OK 73157

VISA
P.O. Box 3121
Evansville, IN 47731

Ben and Mae Wear
3001 N.W. 47th
Oklahoma City, OK 73112

Montgomery Ward
P.O. Box 3369
Merriam, KS 66203

Sears, Roebuck and
Company
c/o Stephen L. Bruce
4200 Perimeter Center Dr.

John W. Gile, Esq.
Gile & Gile
2909 N.W. 31
Oklahoma City, OK 73112

John W. Gile, Esq.
Miller, Dollarhide, Dawson
& Shaw
1200 Colcord Bldg.
Oklahoma City, OK 73102

Suite 200
Oklahoma City, OK 73112

APPENDIX I

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

	:	Filed Sep 20, 1988
IN RE:	:	
	:	
DAVID LEE WEAR,	:	BK-87-5872-A
	:	Chapter 7
Debtor.	:	

ORDER

At the hearing this date the court, on its own motion, considered whether or not this case should be dismissed pursuant to 11 U.S.C. Section 707(b) and/or whether or not it should be dismissed under 11 U.S.C. Section 305(a).

Upon review of the file it appears that debtor's debts are primarily consumer debts and granting of relief of bankruptcy would be substantial abuse of the provisions of Chapter 7 of title 11, for the bankruptcy case serves no purpose except to provide the debtor a new forum to continue to litigate a divorce case between he and his ex-wife.

Furthermore, in the interest of creditors and the debtor would be better served by dismissal for state court is the proper forum to litigate issues in connection with the divorce.

For the foregoing reasons the bankruptcy case is dismissed pursuant to 11 U.S.C. Sections 707(b) and 305(a).

Jurisdiction is retained for the sole purpose of proceeding to determine whether or not sanctions should be imposed on debtor and his counsel pursuant to Bankruptcy Rule 9011 which will be

heard on October 21, 1988 at 9:30 a.m.

Dated at Oklahoma City, Oklahoma this 20th day of September, 1988.

By the Court,
s/ Richard L. Bohanon
Richard L. Bohanon
Bankruptcy Judge

APPENDIX J

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE: BK-87-5872-A	:	Filed Aug 17, 1988
DAVID LEE WEAR,	:	
Debtor.	:	
NANCY ELLAN BOYER,	:	
Plaintiff,	:	
v.	:	ADV. PRO. NO. 87-608
DAVID LEE WEAR,	:	
Defendant.	:	

JUDGMENT ON DECISION BY THE COURT

This proceeding having come on for trial before the court, Richard L. Bohanon, United States Bankruptcy Judge, presiding, and the issues having been duly tried and a decision having been rendered,

It Is Ordered and Adjudged that, pursuant to findings of fact and conclusions of law stated orally and recorded in open court following the close of evidence, that judgment is entered in favor of plaintiff excepting defendant's debt to her from his discharge under 11 U.S.C. Sec. 523(a)(2)(A), and judgment is entered in favor of defendant denying the relief sought by the plaintiff under 11 U.S.C. Sec. 727.

Dated at Oklahoma City, Oklahoma this 17th day of August, 1988.

By the Court.

s/ Richard L. Bohanon
Richard L. Bohanon
Bankruptcy Judge

Entered on judgment docket: Aug 17, 1988

APPENDIX K

AMENDMENT V

No person shall be ... deprived of life, liberty, or property, without due process of law; ....

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

RULE 60. Relief from Judgment or Order

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3)

fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivion (b) does not affect the finality of a judgemnt or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 4004. Grant or Denial of Discharge

(c) Grant of discharge

In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge, the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, or (3) the debtor has filed a waiver under Section 727(a)(10). Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

RULE 8005. Stay Pending Appeal

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

RULE 9006. Time

(b) Enlargement

(1) In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

RULE 9011. Signing and Verification of Papers

(a) Signature

Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, statement of intention, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation.

If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

RULE 9024. Relief from Judgment or Order

Rule 60 F.R.Civ.P. applies in cased under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by Section 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by Section 1144 or Section 1330.

ORIGINAL

FILED
OCT 10 1991
OFFICE OF THE CLERK

NO. 91-391

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANDREW E. KARIM,

Petitioner,

v.

NANCY ELLAN BOYER,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

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SUPREME COURT, U.S.

BRIEF FOR RESPONDENT

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(405) 948-6000

Counsel of Record

October 10, 1991

NO. 91-391

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BRIEF FOR RESPONDENT

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Counsel of Record

October 10, 1991

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Andrew E. Karim filed a Chapter 7 Bankruptcy Petition on August 11, 1987, for David Lee Wear. Wear's former wife, now creditor, Nancy Ellan Boyer brought an adversary proceeding seeking to except her property division alimony debt from Wear's bankruptcy pursuant to 11 U.S.C. §727. The bankruptcy court excepted the Boyer property division alimony judgment from discharge on August 17, 1988.

On September 20, 1988, the bankruptcy trial judge announced that he was dismissing the debtor's bankruptcy petition pursuant to 11 U.S.C. §§707(b) and 305(a), ruling that the debtor was improperly using the bankruptcy system to re-litigate an acrimonious state divorce case. At that same hearing, the trial judge announced his intention to impose sanctions against the debtor and his counsel, Andrew E. Karim, for the misuse and abuse of the bankruptcy system.

The dismissal of the bankruptcy petition was appealed to the District Court and then to the Tenth Circuit Court of Appeals, where it was sustained. During the interim, an order was entered by the clerk of the bankruptcy court inadvertently discharging Wear's indebtednesses. On suggestion of the trial court, Boyer filed a motion seeking the revocation of debtor's discharge as having been improperly entered, pursuant to 11 U.S.C. §105. At the hearing on Boyer's Motion on May 5, 1989, Karim appeared and argued that Wear's debts had been discharged by the court's order of August 17, 1988, and that the court now lacked jurisdiction to

enter any additional orders in the case. The trial court vacated the discharge and imposed sanctions of $2,000.00 against Wear and his attorney, Andrew E. Karim, jointly and severely. It is that order which Karim seeks to have this Court review.

I. THE SANCTION ORDER ENTERED AGAINST KARIM DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioner claims he was denied his due process rights because he was not given adequate opportunity to respond before the bankruptcy court levied sanctions against him. Petitioner was first advised on September 20, 1988, that the trial judge intended to impose sanctions against the Debtor and Petitioner for improperly continuing an acrimonious divorce proceeding in the bankruptcy court. Petitioner was again warned on December 1, 1988, that sanctions were forthcoming. The sanctions were finally ordered by the trial judge at a hearing held May 5, 1989. Petitioner received eight (8) months notice that the bankruptcy trial judge intended to levy sanctions against him. However, Petitioner did nothing.

The liberal due process requirements set forth by the Tenth Circuit Court of Appeals in White v. General Motors Corp., 908 F.2d 675 (10 Cir. 1990), require that actual notice of intent to levy sanctions be given to an individual before sanctions can be ordered. Karim twice received the actual notice of the contemplated sanctions; not just the presumed notice that the existence of Fed. R. Civ. P. Rule 11 and Bankruptcy Rule-9011 is deemed, by some courts, to impart. See, authorities cited in Petitioner's Question 1.

Karim argues that the differences among the circuit courts about what constitutes the proper notice, either actual or imputed, to be afforded a litigant when sanctions are being considered needs to be resolved by this Court in this appeal. Assuming the differences cited by Karim are so extreme as to require reconciliation by this Court, Respondent submits this is not a proper case on which to base such a reconciliation. Karim was sanctioned after actual notice by the Court, which afforded him the full measure of due process protection he was entitled to receive under any of the cited precedents, leaving this court unable to grant Karim any relief.

II. THE BANKRUPTCY COURT HAD CONTINUING JURISDICTION TO IMPOSE SANCTIONS AFTER DISMISSING THE UNDERLING ACTION.

Petitioner contends that the trial court lost jurisdiction to impose sanctions the moment the case was dismissed. This assertion is incorrect. It is settled law that a federal court may consider and adjudicate collateral issues, including sanctions, even though a case has been dismissed. Cooter & Gell v. Hartmann Corporation, et al., _____ U.S. _____; 110 S.Ct. 247 (1990). The trial court had jurisdiction to enter the sanction order appealed from and affirmed by the circuit court. Petitioner has not articulated any reason why this precedent should be reviewed and modified; therefore, this court should decline to do so.

III. MONETARY SANCTION IS AN APPROPRIATE REMEDY WHERE THE TRIAL COURT FINDS THERE IS A MISUSE OR ABUSE OF THE JUDICIAL SYSTEM.

The trial judge had sat in the Wear bankruptcy for almost two (2) years at the time the sanction order was issued. The trial

judge presided over three (3) adversary complaints, eight (8) appeals to the United States District Court for the Western District of Oklahoma, six (6) appeals to the Tenth Circuit Court of Appeals, including an original action seeking discretionary Writs of Mandamus and Prohibition filed in the Circuit Court. Each time the result was the same; the relief sought by Petitioner or his client was denied. It is against this backdrop that the bankruptcy trial judge imposed sanctions against Wear and Karim for misuse and abuse of the bankruptcy system.

The trial judge's ruling was authorized by 11 U.S.C. §§305 and 307 and clearly supported by the facts. The trial judge's ruling was also consonant with existing legal precedent permitting a trial court to impose sanctions as a means of controlling litigation and litigants. Nasco, Inc., v. Calcasieu Television and Radio, Inc., et al., 894 F.2d 696, 703 (5th Cir. 1990), cert. granted. The trial judge did not abuse his discretion in this case; therefore, there is no error for this court to correct.

IV. THE MONETARY SANCTION AGAINST PETITIONER DOES NOT CONSTITUTE EXCESSIVE BAIL OR CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

Petitioner suggests that he might have been subjected to a criminal proceeding and that his rights, under the Eighth Amendment, might have been violated. However, Petitioner was not accused or found guilty of engaging in any criminal act. Petitioner was not subjected to punishment for criminal contempt.

"[W]hen a Court is faced with bad conduct frustrating its ability to discharge its judicial duty, it is not confined to the process of criminal contempt, but may impose other sanctions in order to control the litigation before it." Nasco, Inc., v. Calcasieu Television and Radio, Inc., et al., 894 F.2d 696, 703 (5th Cir. 1990) cert. granted. Imposition of sanctions by the bankruptcy court did not violate any of the protections found in the Eighth Amendment to the United States Constitution because the process did not involve any allegations of criminal conduct. Petitioner's request that the Court consider whether or not a fine can constitute a criminal sanction is not reasonably encompassed within the factual issues and should not be addressed by the Court.

V. A BANKRUPTCY JUDGE HAS CONTINUING JURISDICTION TO REVOKE A DISCHARGE IMPROVIDENTLY OR ERRONEOUSLY ENTERED IN A BANKRUPTCY CASE.

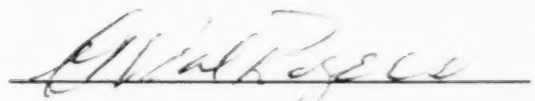
A bankruptcy court has continuing jurisdiction and thus the power to vacate a discharge that has been entered as a result of a clerical error. The trial judge determined that such an error had been made, and corrected it.

The memorandum opinion of the Tenth Circuit Court of Appeals addressed this issue most succinctly when it held, "This argument is without merit. We agree with the bankruptcy court's characterization of the entry of the dismissal order as a clerical error. The Bankruptcy had the power to vacate a discharge entered as a result of a clerical error. See, Matter of Pilar Cordova Antuna, 45 B.R. 271, 272-74, (Bkrtcy. W.D. Mo. 1985)." Nothing improper occurred which requires review by this court.

CONCLUSION

Petitioner does not present any issue which requires review by the court. The Petition should be denied.

LAWRENCE & ELLIS, P.A.

By: 

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Supreme Court, U.S.
FILED
OCT 25 1991
OFFICE OF THE CLERK

(3)

No. 91-391

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANDREW E. KARIM,

Petitioner,

v.

NANCY ELLAN BOYER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ANDREW E. KARIM
Suite 408 Summit Building
5929 North May Avenue
Oklahoma City, Oklahoma 73112
(405) 843-3900

Counsel of Record

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANDREW E. KARIM,

Petitioner,

v.

NANCY ELLAN BOYER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent has presented a slanted, if not misleading, version of the facts. In her attack upon the due process issues raised by the petition in connection with the imposition of sanctions under Bankruptcy Rule 9011, Petitioner, for example, is said to have had "notice" of the bankruptcy judge's intent to impose sanctions since September 20, 1988. The hearing during which sanctions were actually levied took place on May 5, 1989. *If* an idle threat made nearly eight months earlier with *no basis in fact* and having *no legal or factual connection with the May 5 hearing* constitutes "notice" in the due process sense, then yes, this Petitioner had notice. While the record supports the presence of these very circumstances, Petitioner urges that the law should not sustain Respondent's conclusion.

Respondent's link between hostile statements made to the Petitioner by the bankruptcy judge in 1988 and those made to the former several months later in 1989 is imaginary. Even assuming, *arguendo*, that such a link exists, the questions raised by the petition would not change. The due process issue in particular, which encompasses the opportunity to be heard as well as notice, remains a viable subject of national interest. See Reske, *A Kinder, Gentler Rule 11*, ABA Journal, August 1991 at 25 (Advisory Committee on Civil Rules adopted proposal for amending Rule 11 to prohibit surprise imposition of sanctions). Moreover, conflict still exists between circuits regarding what kind of due process must be afforded one who is accused of violating Rule 11 (or Bankruptcy Rule 9011). See Cole, *Rule 11 Now*, Litigation 10 at 50-51 (Spr. 1991).

Respondent's claim to victory is founded upon the notion that the bankruptcy proceedings, in which Petitioner represented the debtor, were merely a "re-litigation" of the divorce between Respondent and debtor. *Nothing is further from the truth.* This Petitioner is guilty of no misconduct whatsoever. The record will prove that the accusations which were thrown at him in bankruptcy court and blindly propagated by the appellate courts are purely fictional. *Fictio cedit veritati. Fictio juris non est ubi veritas.*

Respectfully submitted,

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